

NO. 49737-9-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Dependency of:

A.Z.B., Jr.,

Minor Child.

**DEPARTMENT'S RESPONSE TO M.T.'S AND A.B.'S MOTION
FOR ACCELERATED REVIEW**

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I. INTRODUCTION

The appellants in this case are M.T. and A.B., parents of A.Z.B., Jr. The child was found dependent under RCW 13.34.030(6)(c) at a contested fact finding and disposition hearing on September 12, 2016. The decision was based on both parents' demonstrated inability to meet the child's basic needs, and the risk of substantial harm from both parents' severe mental health issues. A.Z.B., Jr. was placed with a maternal relative shortly after shelter care and the order of dependency and disposition allowed him to remain in that placement after trial. Appellants seek an order overturning the finding of dependency, or in the alternative, overturning the decision to place A.Z.B., Jr. out of the home.

II. RESTATEMENT OF THE ISSUES

1. Does substantial evidence support the trial court's finding of fact that the child is dependent because he has no parent capable of adequately caring for him when the evidence at fact finding showed that they had significant, untreated mental health concerns that prevented them from fulfilling their basic parental functions?

2. Did the trial court abuse its wide discretion when it determined that the child should be placed out of the home, in relative care, when the evidence showed that he could not be adequately protected

in the home, had no parent available to care for him, and there is a manifest danger that he would suffer serious abuse or neglect?

III. COUNTERSTATEMENT OF THE FACTS

A.Z.B., Jr. was born on August 4, 2014 to M.T., the mother and A.B., the father. RP 8. On October 20, 2015, the Department received allegations of medical neglect of A.Z.B., Jr. RP 84. The referrer stated that the paternal grandmother came to the Women, Infants and Children (WIC) office with A.Z.B., Jr. in order to receive financial assistance for milk, cereal and juice for the child. RP 228. The referrer explained that the WIC Office cannot see a child without the parents present. RP 235. The referrer reported that A.Z.B., Jr. had not received follow up medical care, and did not have medical insurance. *Id.* The father and mother were reported to have mental health disorders that impact their ability to provide adequate care to their child. RP 90.

On October 23, 2015, the social worker Jhanna Parker met the mother at the maternal grandmother's house. RP 85. The mother disclosed that she was not at the father's residence because they had a fight and that they have an on-again, off-again relationship. RP 86. During the visit Ms. Parker observed A.Z.B., Jr. accidentally fall and sustain an injury. *Id.* The mother's actions and statements indicated that she did not understand the

child had been injured, despite the child bleeding from the mouth. RP 87-88.

Before the dependency petition was filed the paternal grandmother admitted she had considered filing for third party custody. RP 185. It later came to the Department's attention that the paternal grandmother had a permanent disqualifier on her criminal record, so the child was removed from placement with the paternal grandmother and placed with another relative. RP 89.

The parents agreed to take psychological evaluations, which concluded that the parents had significant mental health problems, and would need significant support and treatment in order to be appropriate parents. RP 133-221; Exhibits (Exs.) 2, 3. Dr. Landon Poppleton conducted a psychological evaluation on the parents on May 3 and 4, 2016. M.T. was diagnosed with persistent depressive disorder, social anxiety, post-traumatic stress disorder, unspecified schizophrenia spectrum and other psychotic disorder, and provisional learning/intellectual disabilities. Ex. 3. A.B. was diagnosed with paranoid schizophrenia as well as a possible intellectual disability. Ex. 2. Dr. Poppleton concluded that neither would be able to adequately parent without significant engagement in treatment. Exs. 2, 3. Despite numerous

requests from both social workers, the parents did not engage in any services voluntarily. RP 90-91, 302-304.

At trial, evidence was presented that indicated the parents were in need of substantial long term mental health treatment. RP 136-221. Dr. Poppleton testified that the mother's test results indicated a high probability of an intellectual disability, and diagnosed the mother with persistent depressive disorder, social anxiety, post-traumatic stress disorder and unspecified schizophrenia. RP 158-63. He concluded that there was a significant risk of psychological harm to the child remaining in the parents' care. RP 146-47. Dr. Poppelton's professional opinion based on his evaluation of the parents was that the chaos created by the parents' unstable mental health creates an environment in which the child would have difficulty meeting developmental milestones. *Id.* He opined that third party intervention would mitigate the risk factors the parents presented to the child. RP 153.

The father's own testimony at fact-finding confirmed Dr. Poppelton's conclusions. The father testified that he experienced paranoia and suffered visual and auditory hallucinations. RP 25. He described an incident four years ago in which he suddenly stopped eating and went to the hospital. RP 25-26. He testified that "interacting with the world around me isn't exactly easy because of my conditions." RP 27. The father also

testified that in 2012 a no contact order was put in place between himself and the paternal grandmother based on an incident that occurred in his home. RP 30. He testified that he has an older child from another woman who he does not parent because of a no contact order. RP 9; Ex. 4. A parenting plan was entered for that child listing mental health as the reason for A.B.'s restricted access to the child. Ex. 5. The father testified that he was not in favor of taking A.Z.B., Jr. to his WIC appointments because he disliked "the medical side of society." RP 442-55.

The mother similarly confirmed Dr. Poppleton's conclusions during her testimony. She testified that she also hears voices and suffers from extreme depression. RP 56-57. She admitted that she had a suicide attempt in 2015. RP 58. She described an incident in which she overslept, leaving A.Z.B., Jr. unattended for a long period of time. RP 72. Despite this incident, the mother testified that she still did not own an alarm clock, and woke naturally. RP 73.

The parents showed, time and time again, that they could not meet the child's basic needs. While in the parent's care, A.Z.B., Jr. missed important immunizations and medical appointments. RP 231. When A.Z.B., Jr. did receive medical care, it was largely at the initiative of, and with significant help from, the paternal grandmother. RP. 228-30, 365. Despite neither parent having employment, the court found that the child

spent significant amounts of time in the care of his paternal grandparent. The paternal grandmother had a domestic violence conviction on her criminal record that permanently disqualified her as a placement for A.Z.B., Jr. RP 88. Both social workers testified that they had each made numerous attempts to engage the parents in services voluntarily. RP 90-91, 302-304. Social worker Annastasia Le testified that the parents avoided interaction with the Department, and that the father's behavior was erratic, angry and unpredictable. RP 285-90; Exs. 12, 13.

The trial court determined that the child met the definition of dependent under RCW 13.34.030(6)(c), in that the child currently had no parent capable of adequately caring for him such that the child is in circumstances which constitute a danger of substantial damage to his psychological or physical development. Clerk's Papers (CP) 45. The court also entered a dispositional order placing the child in relative care. The parents appeal the finding of dependency and the placement of the child outside their care.

IV. ARGUMENT

A. Standard of Review

The court reviews a claim of insufficient evidence by determining whether substantial evidence supports the trial court's findings of fact and whether the findings support the conclusions of law. *Dependency of M.P.*,

76 Wn. App. 87, 90, 882 P.2d 1180 (1994). Evidence is substantial if, when viewed in the light most favorable to the party prevailing below, it is such that a rational trier of fact could find the fact in question by a preponderance of the evidence. *In re Dependency of T.J.B.*, 115 Wn. App. 182, 188, 62 P.3d 891 (2002).

The trial court in a dependency proceeding has broad discretion to evaluate evidence in light of the rights and safety of the child. RCW 13.34.020; *In re Dependency of C.B.*, 61 Wn. App. 280, 287, 810 P.2d 518 (1991). Because only the trial court has the opportunity to hear the testimony and observe the witnesses' demeanor, an appellate court should not judge the credibility of the witnesses or weigh the evidence. *In re A.V.D.*, 62 Wn. App. 562, 568, 815 P.2d 277 (1991). Consequently, the decision of the trial court is entitled to great deference on review and its findings of fact should not be disturbed if they are supported by substantial evidence. *Matter of H.J.P.*, 114 Wn.2d 522, 532, 789 P.2d 96 (1990).

B. The Trial Court Correctly Ruled That A.Z.B., Jr. Is Dependent Under RCW 13.34.030(6)(c)

1. The Law Governing Dependency Fact-Findings

At a dependency fact-finding hearing, the state is required to prove by a preponderance of the evidence at least one of the statutory definitions

of dependency outlined in RCW 13.34.030(6). In this case the Department alleged that child was dependent pursuant to RCW 13.34.030(6)(c) which applied to any child who:

Has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development

RCW 13.34.030(6)(c).

The primary purpose of dependency adjudication is to permit the court to order remedial measures to preserve and restore family ties and to rectify the problems that prompted the state's initial intervention. *In re Dependency of A.W.*, 53 Wn. App. 22, 27, 765 P.2d 307 (1988). Unlike a termination of parental rights proceeding in which the elements of termination must be established by clear, cogent and convincing evidence, a dependency pursuant to RCW 13.34.030(6) need only be proved by a preponderance of the evidence. RCW 13.34.030; *In re Dependency of Chubb*, 46 Wn. App. 530, 535-536, 731 P.2d 537 (1987), *aff'd* 112 Wn.2d 719, 773 P.2d 851 (1989). The burden is purposefully lenient because of the importance of "allowing state intervention in order to remedy family problems and provide needed services." *In re Dependency of Schermer*, 161 Wn.2d 927, 942, 169 P.3d 452 (2007).

The paramount concern of a juvenile dependency proceeding is the child's safety and health. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 598, 70 P.3d 954 (2003). Thus, when the child's right to basic nurture, physical and mental health, and safety conflict with the parent's right to care, custody, and management of the child, the rights of the child prevail. *In re Dependency of T.R.*, 108 Wn. App. 149, 154, 29 P.3d 1275 (2001); RCW 13.34.020.

The dependency statute does not require evidence of actual harm, a risk of harm is sufficient. *See In re J.F.*, 109 Wn. App. 718, 730, 37 P.3d 1227, 1234 (2001). In other words, the Department need not wait for a child to be harmed before it takes protective action. *In re Schermer*, 161 Wn.2d at 951.

Parental presence and desire to care for a child does not necessarily mean that the parent is capable of meeting all of the child's needs. *In re Aschauer's Welfare*, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980). The statute requires a parent to do more than simply be present. RCW 13.34.030(5)(c). The parent must be able to care for the child—i.e., the parent must meet the child's basic needs. *Id.* The court must examine the parent's overall ability to meet his or her parenting obligations. *In re Dependency of J.B.S.*, 123 Wn.2d 1, 12, 863 P.2d 1344 (1993) (citing *Matter of Interest of Pawling*, 101 Wn.2d 392, 397-98, 679 P.2d 916

(1984)). If the parent is unable to meet her parenting obligations, the court must find the child dependent. *See generally, In re Schermer*, 161 Wn.2d at 952.

There are no specific factors to consider when determining whether a parent is capable of parenting under RCW 13.34.030(6)(c). *Matter of Becker's Welfare*, 87 Wn.2d 470, 477-478, 553 P.2d 1339 (1976) (interpreting predecessor statute). The dependency process is not a permanent deprivation of a parent's right to parent their child, *In re Key*, 119 Wn.2d 600, 609, 836 P.2d 200 (1992), and the trial court has considerable discretion in evaluating risk of harm sufficient to establish dependency. *In re Schermer*, 161 Wn.2d at 951. The dominant consideration is the safety and welfare of the child. RCW 13.34.020.

2. The Trial Court's Finding of a (c) Dependency Is Supported by Substantial Evidence Where the Evidence Showed That Both Parents Had Significant Mental Health Issues That Created a Risk of Substantial Physical or Psychological Harm

The court's findings of dependency as to both parents are supported by substantial evidence. The trial court properly found that the state had met its burden in proving that A.Z.B., Jr. is dependent under subsection (c) of RCW 13.34.060(6). A.B. and M.T. failed to meet their child's basic need for adequate medical care despite significant assistance from relatives. RP 228-30, 365. Their mental health clearly factored into

this failure, and further harm to A.Z.B., Jr. would have occurred if he remained in their custody. The parents argue that mental illness, without more, is insufficient to support a finding of dependency under RCW 13.34.030(6)(c). Brief of Appellant (Br. Appellant) A.B. at 9. But the evidence presented at trial clearly demonstrated that the parents' mental health affected their ability to parent and function in general.

The CPS investigator testified that she witnessed the child fall and hit his head and the mother failed to comprehend that the child had been injured. RP 86. The mother admitted that she had at least once overslept and left the child unsupervised. RP 72-73. The father testified that he was not in favor of taking A.Z.B., Jr. to his WIC appointments. RP 442-43. The father demonstrated an indifference to his child's medical needs and suspicion of medical providers. RP 454-55. He admitted that he has suffered from schizophrenia for years, that he quit his job due to his illness, and that he hears voices. RP 22. He testified that he has another child that he does not see due to a no contact order placed against him, and the parenting plan for that child listed mental health as the reason for the restrictions against A.B. RP 9; Exs. 4, 5. The father testified that he was arrested in 2011 due to an incident in which he scared the paternal grandmother out of his home. RP 30. The social worker testified that the parents avoided

interaction with the Department, and that the father's behavior was erratic, angry and unpredictable. RP 285-90; Ex. 12.

In addition to the actions of the parents, the court heard testimony from Dr. Poppelton regarding the risk the parents' untreated mental health disorders posed to the child. The court heard that there was a significant risk of psychological harm to the child remaining in the parents' care. RP 146-47. It also heard that the chaos created by the parents' unstable mental health creates an environment in which the child would have difficulty meeting developmental milestones. *Id.*

The evidence presented was sufficient for a finding of dependency, and is in line with precedent such as *In re Chubb*. In that case, evidence presented at trial indicated that the mother was delusional, including violent acts and unreal beliefs, that she expressed delusions in presence of children, and that mother was unwilling to accept counseling or parenting help. *In re Chubb*, 46 Wn. App. at 532-33. The court found that given those facts, substantial evidence supported a dependency under RCW 13.34.030(6)(c). *Id.*; see also, *In re J.F.*, 109 Wn. App. 718, 37 P.3d 1227 (2001) (finding dependency due to poor decision-making of parent who placed child in circumstances that constituted a danger and noting that evidence of a parent's serious disregard of *potential* harmful consequences

can establish a danger to a child's health, welfare, and safety sufficient to support a finding of dependency).

Here we also have parents who admit to serious, untreated mental health concerns that affect their ability to meet the child's basic needs. The trial court weighed all the evidence and determined that a dependency is appropriate, allowing the Department to provide much-needed services. That finding was supported by the weight of evidence showing that these parents' mental health was such that it created a substantial risk of harm to A.Z.B., Jr. M.T. and A.B.'s unwillingness or inability to correct those issues – even after the Department offered assistance – established that these parents are not currently capable of meeting their parental obligations to this child. That finding should be affirmed as to both parents.

C. The Trial Court Correctly Placed the Children in Relative Care

1. The Evidence Supported an Out of Home Placement

Following entry of an order of dependency the court must decide where dependent children will be placed at disposition. RCW 13.34.130(5) states:

...An order for out of home placement may be made only if the court finds that reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home and to make it possible for the child to

return home, specifying the services, including housing assistance, that have been provided to the child and the child's parent, guardian, or legal custodian, and that preventive services have been offered or provided and have failed to prevent the need for out-of-home placement, unless the health, safety, and welfare of the child cannot be protected adequately in the home, and that:

- (a) There is no parent or guardian available to care for such child;

...

- (c) The court finds by clear, cogent, and convincing evidence, a manifest danger exists that the child will suffer serious abuse or neglect if the child is not removed from the home and an order under RCW 26.44.063 would not protect the child from danger.

A dependency court's decision regarding child placement is a discretionary ruling and will be overturned only upon a showing of abuse of discretion. *In re Dependency of A.C.*, 74 Wn. App. 271, 275, 873 P.2d 535, 537 (1994). A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). "A decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard or if the facts do not meet the requirements of the correct standard." *In re Dependency of K.R.*, 128 Wn.2d 129, 130-31, 904 P.2d 1132 (1995).

The overarching consideration in all dependency proceedings is the best interests of the child. RCW 13.34.020. “When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail.” *Id.* The “best interests of the child” standard applies to placement decisions. *In re Dependency of A.N.*, 92 Wn. App. 249, 252, 973 P.2d 1 (1998).

In this case, the trial court did not abuse its discretion by placing the children outside of M.T. and A.B.’s home. As demonstrated above, evidence presented at trial revealed that the parents are in need of substantial mental health treatment before being able to safely parent. Both social workers testified to the efforts they made to voluntarily engage the parents in the mental health services they need. Despite numerous requests from both social workers, the parents did not engage in any services voluntarily. RP 90-91, 302-304. The efforts made to keep the child in the parents’ home were reasonable.

The need to engage in mental health treatment before being able to safely care for A.Z.B., Jr. was made apparent through the report of Dr. Poppleton. Exs. 2, 3. He concluded that A.B. had “habituated to a serious disorganizing mental illness that is longstanding and somewhat resistant to treatment.” RP 147. Dr. Poppleton described M.T. as “an individual who

is in a tremendous amount of emotional turmoil.” RP 161. He concluded that third party intervention was necessary. RP 165.

2. The Trial Court’s Conclusion That the Parents Are Unavailable to Care for the Child Was Not Manifestly Unreasonable

The parents argue that the court erred in concluding that they were not available to parent the child, thus necessitating an out of home placement. Br. Appellant M.T. at 13-16. They argue that because they are physically available, the standard of placement under RCW 13.34.130(5)(c) should apply. *Id.* But the parents oversimplify the matter, and ignore the statutory context in providing their definition of “available.”

“Available” is not defined in RCW 13.34, and thus its meaning must be determined “in the context of the statute in which [it] appear[s], not in isolation or subject to all possible meanings found in a dictionary.” *State v. Lilyblad*, 163 Wn.2d 1, 9, 177 P.3d 686, 690 (2008). Given that the paramount concern of all dependency proceedings and placement decisions is the best interest of the child, it is illogical to assume that availability simply means physical presence and/or willingness. Rather, a parent is available when they are able to meet the duties of parenthood, which these parents were not for the reasons stated above. *See Webster’s II New Riverside University Dictionary* 141 (1984) (defining “available”

as “[a]ccessible for use: at hand” or “[h]aving the qualities and the willingness to take on a responsibility”) (emphasis added).

Even if the more stringent standard RCW 13.34.130(5)(c) were applied, the record still amply supports an out of home placement. The parents ignore the findings made by the trial court that “[i]t is currently contrary to the child’s welfare to return home” and that “[t]he health, safety, and welfare of the child cannot be adequately protected in the home.” CP 45-46. Clearly the trial court knew that the home was not safe for the child—a home in which both parents suffer severe, unresolved mental health issues and have demonstrated an inability to meet the child’s basic needs. These unresolved issues constitute a manifest danger that the child will suffer serious abuse or neglect if they are not removed from the home. Assistance from family members was unsuccessful in mitigating the parents’ mental health issues prior to the filing of the dependency petition. RP 228-31, 365. Any technical error the trial court made in its findings supporting the out of home placement was harmless.

The trial court did not abuse its discretion by acting unreasonably or untenably when numerous experts and witnesses testified that the child was not safe in the home.

V. CONCLUSION

For the reasons stated above, the Department respectfully requests that this Court affirm the order of dependency and the disposition order placing the children in the care of relatives.

RESPECTFULLY SUBMITTED this 27th day of February, 2017.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Nash Callaghan", written over a horizontal line.

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DATED this 27th day of February, 2017, at Tumwater, Washington.


Ursula Konschak-Grover, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

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